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Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

FLOTILL PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit, entered on June 1, 1960, which affirmed an order of the District Court.

OPINION BELOW

The opinion of the Court of Appeals is reported at 278 F. 2d 850 and appears as Appendix A.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on June 1, 1960 (Appendixes A and B, *infra*, pp. 19-23), and a timely petition for rehearing was denied on July 26, 1960 (Appendix C, *infra*, p. 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE AND RULES INVOLVED

Section 5 (c) of the Administrative Procedure Act, 5 U.S.C. 1004, provides in pertinent part:

> "(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. * * *"

The Rules of Practice of the Federal Trade Commission in pertinent part provide:

> "PART 1—GENERAL PROCEDURES
>
> * * * * *
>
> "SUBPART D—INVESTIGATIONS
>
> * * * * *
>
> "§ 1.34 *Investigational hearings.* (a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including inquiries initiated for the purpose of determining whether or not a respond

dent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust acts are being carried out and cases referred by the courts to the Commission as a master in chancery.

"(b) Investigational hearings may be held before the Commission, one or more of its members, or a duly designated representative, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation."

"§ 1.35 *Investigational subpoenas.* The Commission may issue a subpoena directing the person named therein to appear before a designated representative at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Subpoenas shall be served in the manner provided in § 3.4 of this chapter.

* * * *

"PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

"SUBPART A—SCOPE OF RULES; NATURE OF ADJUDICATIVE PROCEEDINGS

"§ 3.1 *Scope of the rules in this part.* The rules in this part govern procedure in adjudicative proceedings before the Federal Trade Commission.

"§ 3.2 *Nature of Adjudicative proceedings.* Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term does not include other administrative

proceedings such as investigational hearings held prior to the commencement of formal proceedings or for the purpose of inquiring into the manner and extent of compliance with outstanding orders; trade practice conferences; proceedings for fixing quantity limits under section 2(a) of the Clayton Act (15 U.S.C. 13(a)); investigations under section 5 of the Export Trade Act (15 U.S.C. 65); * * *

* * * *

"SUBPART E—HEARINGS

"§ 3.15 *Presiding officials—(a) Who presides.* All hearings in adjudicative proceedings shall be presided over by a duly qualified hearing examiner or by the Commission or one or more members of the Commission sitting as hearing examiner; and the term 'hearing examiner' as used in this part means and applies to such members when so sitting.

* * * *

"§ 3.17 * * *

"(b) *Subpoenas duces tecum.* Application for issuance of a subpoena requiring a witness to appear before a designated hearing examiner at a specified time and place and produce specified documents shall be made in writing to the hearing examiner or to the Commission, and shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope. Any motion to limit or quash such subpoena shall be filed within ten days after date of service of the subpoena."

QUESTIONS PRESENTED

Before the courts below, petitioner urged that it was unlawful for a hearing examiner to issue an investigational subpoena *duces tecum* during adjudicatory proceedings. The Court of Appeals decided

that, once the District Court issues an order of enforcement, the appellate courts are precluded from inquiring into the validity of the administrative subpoena. In a petition for rehearing, petitioner pointed out that the Court of Appeals decision was in direct conflict with a Supreme Court decision and an earlier decision of the Court of Appeals for the Ninth Circuit. The petition for rehearing, however, was denied. Thus, this petition raises the immediate question:

Whether the Court of Appeals erroneously ruled that a District Court order enforcing an administrative subpoena forecloses the Court of Appeals from inquiring into the validity of the underlying administrative subpoena.

Inherent in this question is the broader question of administrative law:

Whether it is unlawful for a hearing examiner, sitting as a judicial official, to issue an investigational subpoena *duces tecum* returnable before him in a pending adjudicatory proceeding.

STATEMENT

On August 6, 1958, the Federal Trade Commission issued a formal complaint against petitioner Flotill Products, Inc. ("Flotill") charging violation of subsections 2(c) and 2(d) of the amended Clayton Act, 49 Stat. 1526; 15 U.S.C. § 13 (R. 8-14).[1] Following the appointment of the hearing examiner and the scheduling of hearings, counsel in support of the complaint filed an application with the hearing examiner for a subpoena *duces tecum*—which was in fact

[1] The symbol "R" is used to refer to the printed transcript of record before the Court of Appeals.

investigational. The hearing examiner on January 6, 1959, issued the subpoena *duces tecum* (R. 14-15) requiring that return be made by Flotill before him on February 2, 1959, in Stockton, California, at a public hearing in adjudicatory proceedings involving Flotill. At issue here is whether a hearing examiner, in a judicial capacity, may issue an investigational subpoena returnable in an adjudicatory proceeding. Petitioner contends that such action violates the Administrative Procedure Act and the procedural rules of the Federal Trade Commission.

The subpoena *duces tecum* contained the broadest type of investigational demands, including the production of books, records and documents covering all of Flotill's 2,500 customers throughout the United States for all of Flotill's product lines for a three-year period. On January 23, 1959, Flotill filed a motion to quash the subpoena on the ground that the investigational subpoena was improperly issued by the hearing examiner in an adjudicatory proceeding. In denying the motion on February 2, 1959 (R. 16-24), the hearing examiner ruled that the pending adjudicatory proceeding, "while not purely investigatory in nature, is nevertheless an extension of the power of Congress to investigate matters of public concern . . ." (R. 21). Thereafter an appeal from the hearing examiner's ruling was taken by Flotill to the full Commission. On May 11, 1959, Flotill's petition was denied by the Commission (R. 24-31). The hearing examiner then ordered the subpoena returnable at a hearing scheduled for July 7, 1959, in San Francisco, California. After Flotill respectfully declined to comply with the subpoena, the Commission thereupon petitioned the District Court to enforce the subpoena

in its entirety (R. 3-7, 31), as provided for by statute (15 U.S.C. § 49).

A hearing was held before the District Court on August 11, 1959, Judge Willis W. Ritter of the District Court of Utah sitting specially. Considering the purpose and the scope of the subpoena, the Court stated:

> "It seems to me that this is an elaborate fishing expedition, really, in the fullest sense of the word, because you are going after every customer in 48 states. . . . it seems to me that you are subordinating the adjudicative proceeding, the principal thing you are doing here is investigating. . . . It looks to me as though you have a full fledged investigation under way here . . ." (R. 85-6).

The Court later added:

> "I am prepared to make a ruling I think this subpoena is oppressive. As a matter of fact it is objectionable on the same grounds the *Menzies* case talks about, discloses information to competitors, injures respondents in several ways, opens the whole thing up publicly, a fishing expedition that covers 48 states. Every one of the people who have ever bought a can of food from these people over a period of three years. . . . I defy you to find one precedent where a subpoena is fraught with the potential injurious consequences to a respondent, the publicity that would be entailed, potentially; where it is so oppressive, a fishing expedition, where it is an investigation after the complaint has been filed in an attempt to justify it and prove what you have alleged" (R. 95).

On the critical issue of the type of subpoena, the Court said:

> "It's an investigational subpoena, no question about it" (R. 90; also R. 107).

The District Court, while recognizing that the subpoena was investigational in character and unauthorized by law, nevertheless refused to deny enforcement; instead, the Court proceeded to rewrite the specifications of the subpoena and, as refashioned, ordered its enforcement. The Court thus substituted a wholly new subpoena for the subpoena of the hearing examiner.

On appeal, petitioner urged (1) that the subpoena of the hearing examiner was an unlawful investigational subpoena issued for adjudicatory purposes and (2) that it was error for the District Court to rewrite and order the enforcement of the unlawful administrative subpoena. The Court of Appeals, relying on this Court's decision in *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946), ruled that, since the District Court had issued an order for the production of documentary evidence, it was unnecessary to inquire into the validity of the underlying subpoena issued by the hearing examiner (*infra*, pp. 21-22). The only question before it, the Court stated, was the validity of the order of the District Court; and finding no illegality in the Court's order, the Court of Appeals affirmed the order of the District Court (*infra*, pp. 21-23).

Petitioner then filed a petition for rehearing, pointing out that the decision of the Court of Appeals was in square conflict with a decision of this Court, as well as a prior decision of the Ninth Circuit. Those

decisions hold that an appellate court, in reviewing a District Court order, must consider the validity of the underlying administrative subpoena. The Court of Appeals nevertheless denied the petition for rehearing (*infra*, p. 24).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals affirming the District Court order based on an unauthorized administrative subpoena raises an issue of great importance in administrative law. This decision, in which the Court refused to consider the illegality of the underlying administrative subpoena, conflicts with a decision of this Court and, *sub silentio*, with a prior decision by the Court of Appeals of the Ninth Circuit. Moreover, the procedures sanctioned by the court below, we submit, would seriously jeopardize the fundamental principle of administrative law guaranteeing the internal separation of investigative and adjudicative functions in administrative agencies.

1. It is settled law that a Federal Trade Commission hearing examiner is empowered to issue only adjudicative subpoenas in adjudicative proceedings. The Administrative Procedure Act, Section 5(c) (5 U.S.C. 1004) directs that there be a complete separation of investigative and adjudicative functions of administrative agencies; and the authority of the hearing examiner is specifically so limited by the Rules of Practice and Procedure of the Federal Trade Commission (Rules 1.34-35 and 3.17(b) and 3.2). In plain violation of these legal standards (as found by the District Court), the hearing examiner in the instant case issued the broadest type of investigational subpoena during

the course of an adjudicative hearing. The District Court stated:

> "It's an investigational subpoena, no question about it". (R. 90).

Later the Court said:

> ". . . I think this subpoena is oppressive. * * * Not a court in the land and I defy you to find one precedent where a subpoena is brought with the potential injurious consequences to respondent, the publicity that would be entailed, potentially, where it is so oppressive, a fishing expedition, where it is an investigation after the complaint has been filed in an attempt to justify it and prove what you have alleged there" (R. 93).

Despite the clear illegality of the subpoena, the District Court insisted on rewriting the specifications of the subpoena and issuing an order of enforcement. This action was plainly unwarranted. On review, the Court of Appeals, mistakenly relying on a decision of this Court, refused to inquire into the validity of the original subpoena. In its decision, the Court of Appeals stated:

> "We find it unnecessary to inquire into the validity of the subpoena issued by the hearing examiner because, as has been said by the Supreme Court of the United States, appeals such as this 'raise only the question whether orders of court for the production of specified records have been validly made. . . .' Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 195 (1946). . . . Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

Nothing in this Court's opinion in *Oklahoma Press Publishing* supports the petitioner's position that the hearing examiner's subpoena is "irrelevant" in reviewing the validity of a District Court order of enforcement. On the contrary, *Oklahoma Press Publishing* holds that there must be a valid underlying subpoena to support the order of the District Court. The error of the Court of Appeals in this case results from the fact that the Court ignored the full holding in *Oklahoma Press Publishing*. The Court of Appeals properly noted this Court's ruling that appeals from a court order such as that involved here "raise only the question whether orders of court for the production of specified records have been validly made. . . ." But this Court then went on significantly to point out that

> "[no] *objection has been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them*" (327 U.S. at 195, emphasis added).

This Court's validation of the order in *Oklahoma Press Publishing* was firmly based upon its validation of the underlying subpoena. Thus, the order of the District Court *must* be predicated upon a valid administrative subpoena.

This very point was made in an earlier decision by the Court of Appeals for the Ninth Circuit in *Detweiler Bros. v. Wallace*, 157 F. 2d 841 (9th Cir. 1946), where the Court (Judges Denman, Bone, and Orr) pointed out:

> "If the demands of the [administrative] subpoena were outside the four corners of the law, the court could not lawfully order its enforcement regardless of any allegations in a petition for enforcement. *The demands of the subpoena alone pro-*

vided the basis for a correct determination by the court" *Id.* at 844, emphasis added.

The decision below is thus in conflict with this Court's holding in *Oklahoma Press Publishing* and a prior decision in the same Circuit. Both of these decisions compel a ruling contrary to that reached by the court below.

This petition raises an issue of paramount importance in administrative law. The hearing examiner, sitting as a judicial officer, issued an investigational subpoena, in direct violation of the Administrative Procedure Act and the Rules of Practice and Procedure of the Federal Trade Commission.

In the 1946 Administrative Procedure Act (5 U.S.C. 1000) Congress expressly sought to separate "investigative and adjudicative" functions of administrative agencies such as the Federal Trade Commission. (See discussion in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, particularly pp. 36-45 (1950).) This basic principle of separation of functions contained in Section 5(c) of the Act is now embodied in the Rules of Practice and Procedure of the Federal Trade Commission. Part 1 of the Commission's Rules of Practice relates solely to investigative functions, while Part 3 of these Rules relates wholly to adjudicative proceedings. Rule 1.34 provides that "investigational hearings, *as distinguished from hearings in adjudicative proceedings*, may be conducted in the course of any investigation . . ." while Rule 3.2 provides "adjudicative proceedings . . . do not include other administrative proceedings such as investigational hearings held prior to the

[2] The court below did not refer to the *Detweiler* case. In a petition for rehearing petitioner pointed out the conflict in decisions, but the court denied the petition. *infra*, p. 24.

commencement of formal proceedings . . ." Rule 3.35 specifically relates to the issuance of subpoenas *duces tecum* "to produce documentary evidence relating to any matter under investigation," while Rule 3.17(b) provides that a hearing examiner may issue a subpoena *duces tecum* "requiring specified documents [which] shall specify as exactly as possible the documents to be produced showing their general relevance and scope."

Throughout this proceeding the Commission and its counsel have refused to adhere to the basic distinction between investigation and adjudication demanded by its own Rules and the Administrative Procedure Act. Indeed, Commission counsel before the District Court made the astonishing statement that:

> "The procedure involved in the hearings that is, the adjudicative process, is nothing more than a continuation of the power to investigate acts and practices in inter-state trade" (R. 68).

Similarly, in the Court of Appeals, the Commission adopted the view that investigation and adjudication are merely "different stages of investigation" (Br. p. 17). The separation of the provisions in the Commission Rules, the one relating to investigative procedures, the other to adjudicative procedures, it was said, is merely a matter of "convenience," without substance. These separate rules, according to the Commission, ". . . merely provide that the Commission may hold hearings in both *ex parte* and adjudicative proceedings, and the designation of these rules as investigative and adjudicative is no more than a happenstance, since the Rules

> "for obvious reasons of convenience of expression, use the term 'investigation' to designate an *ex parte* proceeding, and the term 'adjudication' to

designate an 'adversary' proceeding, rather than the less definitive *but equally accurate term* 'investigation' qualified by some modifying term, for both" (Br. p. 21, emphasis added).

The Commission's attempt to fuse adjudication and investigation is particularly startling in view of its prior position that the two functions should be wholly separated. In *Federal Trade Commission* v. *Hallmark, Inc.*, 265 F. 2d 433, (7th Cir. 1959), the Commission argued before the Court of Appeals that hearing examiners were precluded by the Administrative Procedure Act from participating in investigations and in fact were "appointed for the purpose of conducting hearings in adjudicatory and rule making proceedings *and none other*." (Emphasis supplied.)[3]

[3] The point was fully developed in the Commission's *Hallmark* brief before the Seventh Circuit. For example:

> Appellants' argument confuses an investigational proceeding, such as the one that occasioned these subpoenas, with an adjudicative proceeding. . . . Should the investigation indicate probable violation and sufficient public interest, the Commission might then issue a formal complaint commencing a proceeding that would become "adjudicative" and thus within the provisions of the Administrative Procedure Act relating to adjudicative proceedings. . . .
>
> The fallacy of appellants' position becomes manifest upon considering the functions of a "hearing examiner" under the Administrative Procedure Act, which applies to proceedings of the Federal Trade Commission. Under Section 11 of that Act (5 U.S.C. § 1010), the hearing examiner is appointed for the purpose of conducting hearings in adjudicative and rule making proceedings and none other. . . .
>
> It is thus necessary to distinguish adjudicative proceedings from investigations, rule making obviously being entirely outside the scope of the present discussion. . . . Consequently, under the provisions of the Administrative Procedure Act, the conduct of investigatory proceedings is not one of the functions of the hearing examiner created by that act. . . .

(pp. 24-27, footnotes omitted.)

Only last Term, in *Hannah* v. *Larche*, 363 U.S. 420 (1960), the Solicitor General urged this Court to distinguish the type of procedures required in investigation from those required in adjudication. In the government's brief, the Solicitor General, *using the specific example of the Federal Trade Commission*, strongly argued that the rules of the regulatory agencies draw a "sharp distinction" between investigatory and adjudicatory proceedings (Br. pp. 56-57). "If a formal complaint, leading to agency action, is filed," the Solicitor General stated, "*the subject of the inquiry will have all of the rights attaching to a trial-type hearing*; but it is unnecessary to afford such procedures in a proceeding which cannot result in an order determining his rights" (Br. p. 58, emphasis added).

This Court, relying on the government's representations, emphasized in its opinion that procedures used in investigation are not permissible in adjudication. "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals," the Court stated, "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process" (363 U.S. at 442). In this Court's opinion, specific reference was made to the Federal Trade Commission:

> "A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. * * * We have found no authority suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all of the traditional judicial safeguards at a subsequent adjudicative proceeding. . . ." (*Id.* at 446).

Yet, at every stage of the instant case, the Commission took just the opposite position; despite what the Solicitor General told this Court was the practice before the Federal Trade Commission,[4] that agency, as we have seen, consistently sought to obliterate the fundamental distinction between investigation and adjudication. Ignoring the separation principle, the Commission argued throughout that hearing examiners during adjudication should be permitted to participate in investigational activities in the same proceeding. Thus, the validation of the Commission's action by the Court of Appeals (even though the District Court had substantially rewritten the subpoena) can have only the effect of encouraging disregard of the scope of adjudicative subpoenas in administrative proceedings, in the secure knowledge that the courts will not refuse enforcement of such subpoenas in the event a challenge is raised, but will simply rewrite them into lawful dimensions. This view would permit flagrant abuses resulting from the careless mixing of investigation with adjudication. It is to prevent this unlawful action—and to insure adherence to the principles of *Hannah* v. *Larche*—that review is sought here. Plainly the issue presented in this case transcends the immediate case and even the practices before the Federal Trade Commission, for it directly involves the procedures before all Federal administrative agencies conducting adjudicative hearings.

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[4] And despite the Commission's contrary position in prior litigation. See page 14, *supra*.

CONCLUSION

Because the decision below conflicts with this Court's decisions in *Oklahoma Press Publishing Co.* v. *Walling* and *Hannah* v. *Larche* and an earlier decision of the Ninth Circuit in *Detweiler Bros.* v. *Walling* and because it raises an issue of first importance in administrative law, petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,658

June 1, 1960

FLOTILL PRODUCTS, INC., *Appellant*,

v.

FEDERAL TRADE COMMISSION, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MATHES, ORR and JERTBERG, *Circuit Judges*.

ORR, *Circuit Judge*:

After what Flotill Products, Inc., hereafter Flotill, describes as a broad examination of its affairs, the Federal Trade Commission, hereafter Commission, issued its complaint charging that Flotill had violated and was violating the provisions of sections 2(c) and 2(d) of the amended Clayton Act, 15 U.S.C. § 13(c) and (d). Thereafter the Commission referred the case to a hearing examiner. During the course of the proceedings before the hearing examiner an application was made by counsel supporting the complaint for the issuance of a subpoena duces tecum. The subpoena was issued and Flotill, deeming it oppressive and illegally issued, refused to comply. The Commission then made application to the United States District Court for the Northern District of California, Southern Division,

for an order pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which reads in relevant part:

> "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in the case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Flotill answered and after a hearing the district court entered the following order:

> "It Is Therefore Ordered that respondent, Flotill Products, Incorporated produce the documents described in the said subpoena in items 1, 2 and 4, and as to item 3 relating only to any three trade areas, and any four customers irrespective of the trade areas specified, to be designated at a later date by petitioner, at respondent's place of business, before any representative of the Commission so designated by it, on ten days notice from the Commission and that the said respondent permit the inspection and copying of any such document; provided however that respondent need not produce any of the documents described in said subpoena relating solely to the sale of dietetic foods."

Items 1, 2, 3 and 4 of the subpoena read:

> "1. A copy of the annual report for each year 1956, 1957, and 1958.
>
> 2. A list of any and all products produced and or processed by respondents during 1956, 1957, and 1958.

indicating the item, type, grade, and quantity produced for each year.

3. Such books, records, and documents, or certified tabulations thereof, as will disclose:

(a) The names and addresses of each customer of respondents during each of the years 1956, 1957, and 1958;

(b) The method of sale ('direct' or 'indirect') to each customer listed in (a) and the name of the broker, if 'indirect';

(c) The total volume of sales to each customer listed under (a), per year;

(d) The total amount of all advertising funds, promotional allowances, etc., paid or allowed per year during 1956, 1957, and 1958 to each customer listed under (a).

4. Regarding all customers in the trade area of Boston, Massachusetts, all invoices and credit memoranda for all sales during 1956, 1957, and 1958."

Appellant makes no claim that the filing of a complaint by the Commission terminates its power to investigate but does assert that the hearing examiner is without authority to issue an "investigative" subpoena which Flotill claims he did here. We find it unnecessary to inquire into the validity of the subpoena issued by the hearing examiner because, as has been said by the Supreme Court of the United States, appeals such as this "raise only the question whether orders of court for the production of specified records have been validly made. . . ." Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 195 (1946). Flotill attacks the order of the district court on the ground that said court may not issue an order independent of and different in character from the administrative subpoena which was

disobeyed. Its argument in support thereof is not persuasive. Section 9 of the Federal Trade Commission Act, hereinbefore quoted, imposes no such limitation on the court's power to aid the Commission in an investigation admittedly authorized by Congress. The proceeding in the district court was not ancillary to prior administrative action but formed an independent cause of action framed by the pleadings therein. I.C.C. v. Brimson, 154 U.S. 447, 487 (1894). Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant.

Appellant does not claim that the order is oppressive but it does object that the order permits the Commission to demand records relating solely to intrastate commerce. Whether a transaction the Commission decides to investigate is one in interstate commerce is to be initially determined by the Commission from the records it receives responsive to the court's order. Okla. Press Pub. Co. v. Walling, supra; Endicott Johnson Corp. v. Perkins, 317 U.S. 501, (1943).

Order Affirmed.

(Endorsed) Opinion Filed June 1, 1960.

Frank H. Schmid, *Clerk.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLOTILL PRODUCTS, INC., *Appellant*,

v.

FEDERAL TRADE COMMISSION, *Appellee*.

Judgment

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came to be heard on the transcript of Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration thereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: June 1, 1960

FRANK H. SCHMID, *Clerk*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings July 26, 1960, Tuesday.

Before: Orr, Madden and Jertberg, C.J.J.

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of the Appellant filed June 28, 1960, and within the time allowed therefor by Rule of Court, for a rehearing in the above cause be, and hereby is denied.

RESPONDENT'S BRIEF IN OPPOSITION

No. 499

In the Supreme Court of the United States

OCTOBER TERM, 1960

FLOTILL PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Interstate Commerce Commission v. *Brimson*, 154 U.S. 447 — 4

Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 — 5, 6

Statutes and rules:

Clayton Act, 15 U.S.C. 13(c), (d):

§ 2(c) — 3

§ 2(d) — 3

Federal Trade Commission Act, 38 Stat. 717, *et seq.*, 15 U.S.C. 49:

§ 9 — 2, 3

Federal Rules of Civil Procedure, Rule 34 — 8

Rules of Practice and Procedure of the Federal Trade Commission:

Rule 1.35 — 7

Rule 3.17(b) — 7

Rule 3.17(d) — 7

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 490

FLOTILL PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 19–22) is reported at 278 F. 2d 850.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1960 (Pet. 23), and a timely petition for rehearing was denied July 26, 1960 (Pet. 24). The petition for a writ of certiorari was filed on October 21, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below, having found no error in the district court's order for enforcement of a subpoena issued by a hearing examiner of the Federal

Trade Commission, properly affirmed the order without passing upon the question of alleged irregularity in issuance of the Commission's subpoena.

STATUTE INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 49, provides in part as follows:

> For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
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> * * * * * *

STATEMENT

In August 1958, the Federal Trade Commission issued a complaint charging petitioner with violating

§§ 2(c) and 2(d) of the Clayton Act, 15 U.S.C. 13(c), (d). At the request of the Commission's trial counsel, the examiner appointed to hear the complaint issued a subpoena *duces tecum* requiring the petitioner to produce before the examiner books, records and documents of certain specified categories (R. 14–16). Petitioner then moved to quash or limit the subpoena, not on the ground of irregularity in its issuance, but on the grounds that it covered data relating to transactions not within the Commission's jurisdiction, that it requested data irrelevant to the allegations of the Commission's complaint, and that it was unreasonable in scope (R. 42–43). The examiner limited the subpoena to data relating to transactions in the continental United States and otherwise denied petitioner's motion, and the Commission, on appeal, upheld the examiner's ruling (R. 16–24, 26). Petitioner refused to comply, and the Commission, pursuant to § 9 of the Federal Trade Commission Act, applied to the district court for an order directing compliance (R. 3, 5–6).

At the hearing on the Commission's application, the court expressed the view that in a proceeding of this kind discovery should be granted with "great liberality" (R. 84). It said that "we ought to have as wide discovery as we can, consistent with proper protection of the company whose documents were sought (R. 107), and it urged the parties to try to reach agreement upon an appropriate limitation of the data called for by the Commission's subpoena (R. 84, 89, 97–98, 102). After the parties reported that they had reached agreement on this point (R.

105-111), the court entered an order requiring production of the agreed-upon scope (R. 55-56). Petitioner's counsel, however, objected to the court's elimination of a proposed finding that the Commission had issued an "investigational subpoena", and declared that the court's order was not to be deemed an "agreed order" (R. 109).

On appeal from this order, the court below affirmed. It found it unnecessary to pass upon the question of any defect in the Commission's subpoena arising by reason of the alleged issuance of a so-called "investigative subpoena" in an adjudicative proceeding (Pet. 21). It said that §9 of the Federal Trade Commission Act gave the court power to aid the Commission in procuring needed documents, and did not confine the power of the court to mere approval or disapproval of the subpoena issued by the Commission (Pet. 21–22). It said (Pet. 22): "Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

ARGUMENT

1. The court below held that it need not pass upon petitioner's contention that the subpoena issued by the hearing examiner was an "investigative" subpoena which the examiner was not authorized to issue, because the question before it was, not the validity of this subpoena, but the validity of the district court's order to produce documents (Pet. 21). It said, citing *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, that the district court proceeding "was not ancillary to prior administrative

action but formed an independent cause of action framed by the pleadings therein", and that, upon entry of the district court's judgment, "the hearing examiner's subpoena was superseded and became irrelevant" (Pet. 22).

When the Commission, following disobedience of a subpoena which it has issued, invokes the aid of a court in requiring production of documentary evidence, the validity of the court's order to produce is to be determined on the basis of the requirements of the order, and the order is not invalidated by reason of defects in the administrative subpoena which the court's order eliminated or corrected. *Hagen* v. *Porter*, 156 F. 2d 362, 365–366 (C.A. 9), certiorari denied, 329 U.S. 729; *Detweiler Bros.* v. *Walling*, 157 F. 2d 841, 842 (C.A. 9), certiorari denied, 330 U.S. 849. In the *Detweiler* case, the court, in upholding an order to produce, rejected the contention that the administrative subpoena had been fatally indefinite. It said (p. 842): "The matter appealed from is the *order* of the District Court and it is not indefinite or uncertain."

The statement from the *Detweiler* opinion quoted by petitioner (Pet. 11–12) does not qualify the court's holding as to the immateriality of possible errors in the administrative subpoena which the court's judgment has corrected. Of course, if the "demands" of an administrative subpoena are "outside the four corners of the law", no basis is laid for a judgment of enforcement. We also note that both the court below and petitioner have relied on certain statements made by this Court in *Oklahoma Press Publishing*

Co. v. *Walling*, 327 U.S. 186, 195, in discussing the question of unreasonable search and seizure contrary to the Fourth Amendment (Pet. 11, 21). But the most that petitioner can draw from this case is to cast doubt upon the reliance below on the language quoted from the *Oklahoma Press* opinion.

2. Petitioner's principal contention appears to be that the hearing examiner's subpoena had an "investigative" purpose and that its issuance in an adjudicative proceeding constituted disregard of "the basic distinction between investigation and adjudication" required by the Commission's Rules of Practice and the Administrative Procedure Act. The contention is that in the present matter the Commission has attempted to "obliterate" this distinction and to "fuse" investigation and adjudication. See Pet. 12–16.

Our position is that the facts unmistakably establish that the examiner's subpoena was issued in the course of, and in aid of, an adjudicative proceeding, and that the subpoena was of a type and character properly issued in such a proceeding. This being so, the subpoena cannot be attacked on the ground that it was allegedly "investigational" rather than "adjudicatory" in character. Every subpoena that calls for documents by categories rather than individually necessarily is, to that extent, "investigational", but this consideration does not invalidate an otherwise proper subpoena. Since here there was strict adherence to all the safeguards which the Commission's Rules of Practice provide for subpoenas in adjudicative proceedings, not even a colorable question of

error was raised in the court below or is presented here. In these circumstances, no ground for the grant of certiorari is shown.

The subpoena here involved was, beyond any question, issued in aid of an adjudicative proceeding. It was issued after the complaint was filed, and by the examiner assigned to hear the case. Every related procedural step bore the docket number of the Commission's complaint charging petitioner with violation of the Clayton Act (R. 8, 14, 24, 26, 42). This alone would establish the subpoena's character, but in addition the words of the subpoena were expressly related to this complaint (R. 14), and the same was true of the application leading to its grant (R. 24-25).

The Commission's Rules of Practice provide rights and safeguards as to subpoenas issued in adjudicative proceedings which are not provided as to subpoenas issued in aid of a Commission *ex parte* investigation,[1] and such rights and safeguards were observed in this case.[2] Moreover, petitioner exercised rights allowed

[1] Compare Rule 1.35 with Rule 3.47(b) (see Pet. 3, 4). See also Rule 3.47(d), which provides: "An appeal may be taken to the Commission within ten days from the denial of any motion to issue, limit or quash any subpoena."

[2] The application for the subpoena was made in writing to the hearing examiner and set forth reasonable need for requiring production of the documents specified, and asserted their relevancy to the issues in the complaint (R. 24-25). The subpoena which was issued was also made returnable before the hearing examiner appointed by the Commission (R. 14), whereas Rule 1.35 governing so-called "investigational" subpoenas merely calls for production before a designated "representative" of the Commission, and such representative need not be a hearing examiner appointed in conformity with § 11 of the Administrative Procedure Act. *F.T.C. v. Hallmark, Inc.*, 265 F. 2d 433 (C.A. 7).

to those under subpoena in adjudicative proceedings but not in investigations, namely, the right to file a motion to limit or quash and the right to appeal to the Commission from denial of this motion (R. 42-43, 27-31).

It is settled that the Commission is authorized to issue a subpoena in an adjudicative proceeding, calling for production of, not only particular documents, but documents of a specified character or subject matter. *F.T.C. v. Menzies*, 145 F. Supp. 164, 166 (D. Md.), affirmed, 242 F. 2d 81 (C.A. 4), certiorari denied, 353 U.S. 957; *Cutts v. F.T.C.*, 244 F. 2d 882, 884-886 (C.A. 9), reversed, 355 U.S. 9. See also *C.A.B. v. Hermann*, 353 U.S. 322, reversing *Hermann v. C.A.B.*, 237 F. 2d 359 (C.A. 9), and holding that, under statutory provisions like those of the Federal Trade Commission Act, an administrative agency may issue this type of subpoena in an adjudicative proceeding. In the *Menzies* case, the court of appeals said: "To deny such power to the Commission would in large measure defeat the purpose which Congress manifestly had in mind in the enactment of these statutes * * *." 242 F. 2d at 84.

A federal court, when it issues an order requiring the discovery and production of documents on motion of a party to the cause, as authorized by Rule 34 of the Federal Rules of Civil Procedure, is not thereby converted into an investigative or prosecuting body. Equally, the hearing examiner, when he issued, in accordance with the Commission's Rules, a subpoena requiring the production of documents sought by the

Commission's trial attorney, did not thereby become an investigating or prosecuting officer of the Commission. Petitioner cites no authority in support of its contention that the examiner's action constituted an improper commingling of investigative and adjudicative functions, and we submit that the issuance of the subpoena plainly was a proper step in the Commission's adjudicatory proceeding.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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